

LEGAL SOLUTIONS IN HEALTH REFORM—THE
CONSTITUTIONALITY OF MANDATES TO PUR-
CHASE HEALTH INSURANCE

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EXECUTIVE SUMMARY

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INTRODUCTION

Health insurance mandates have been a component of many recent health care reform proposals. Because a federal requirement that individuals transfer money to a private party is unprecedented, a number of legal issues must be examined. This paper analyzes whether Congress can legislate a health insurance mandate and the potential legal challenges that might arise, given such a mandate. The analysis of legal challenges to health insurance mandates applies to federal individual mandates, but can also apply to a federal mandate requiring employers to purchase health insurance for their employees. There are no Constitutional barriers for Congress to legislate a health insurance mandate as long as the mandate is properly designed and executed, as discussed below. This paper also considers the likelihood of any change in the current judicial approach to these legal questions.

POTENTIAL SOLUTIONS

Congress's Authority to Regulate Commerce: The federal government has the authority to legislate a health insurance mandate under the Commerce Clause of the United States Constitution. A federal mandate to purchase health insurance is well within the breadth of Congress' power to regulate interstate commerce. Congress can avoid legal challenges related to the 10th Amendment and states' rights by preempting state insurance laws and implementing the mandate on a federal level. If Congress wants states to implement a federal mandate, it has the following two options:

Conditional Spending: Congress may condition federal funding, such as that for Medicaid or public health, on state compliance with federal initiatives.

Conditional Preemption: Congress may allow states to opt out of complying with direct federal regulation as long as states implement a similar regulation that meets federal requirements.

Congress's Authority to Tax and Spend for the General Welfare: Congress also has the authority to legislate a health insurance mandate under its Constitutional authority to tax and spend. There are no plausible Tenth Amendment and states' rights issues arising from Congress's taxing and spending power. However, Congress' taxation power cannot be used in a way that burdens a fundamental right recognized in the Constitution's Bill of Rights and judicial interpretations by the U.S. Supreme Court. Since there is no fundamental right to be uninsured, no fundamental rights challenge exists.

Other Relevant Constitutional Rights: Challenges under the First and Fifth Amendments relating to individual rights may arise, but are unlikely to succeed. The federal government should include an exemption on religious grounds to a health insurance mandate as an added measure of protection from legal challenges based on religious freedom. In the alternative, the federal government can simply exempt a federal insurance mandate from existing federal legislation protecting religious freedom.

Considerations: To avoid a heightened level of scrutiny in any judicial review, the federal government should articulate its substantive rationale for mandating health insurance during the legislative process.

LEGAL ISSUES & APPLICABLE LAW

Commerce Clause: Congress has the power to regulate interstate commerce, including

local matters that substantially affect interstate commerce. Health care and health insurance both affects and is distributed through interstate commerce, giving Congress the power to legislate an insurance mandate using its Commerce Clause powers.

Taxing and Spending Power: Congress has the power to tax and spend for the general welfare. It can use its taxing power to implement a "pay or play" model to tax individuals that did not purchase insurance or provide tax benefits to those that do purchase insurance. Congress can also use its spending powers to influence state action. The taxing power of the federal government can be limited if a tax intentionally and directly burdens the exercise of a fundamental right.

Federalism: The 10th Amendment and principle of state sovereignty in the Constitution prohibit the federal government from commanding the states to implement federal law or policies that would interfere with state sovereignty. This is referred to as the "anti-commandeering" principle. A federal employer mandate covering state and local government workers appears consistent with existing Constitutional decisions but still might be susceptible to challenge under the Tenth Amendment.

Individual Rights: The First and Fifth Amendment contain provisions that may have some bearing on a health insurance mandate.

Free Exercise of Religion: The First Amendment's Free Exercise Clause protects the free exercise of religion. In addition, the Religious Freedom Restoration Act (RFRA) prevents the federal government from enacting a law that substantially burdens an individual's exercise of religion, unless the government has a compelling interest.

Due Process and Takings Clauses: The Fifth Amendment includes two relevant provisions. The Due Process Clause guarantees that no person shall be deprived of life, liberty, or property without due process of law. The Takings Clause states that the government may not take an individual's property without just compensation.

CONCLUSION

The Constitution permits Congress to legislate a health insurance mandate. Congress can use its Commerce Clause powers or its taxing and spending powers to create such a mandate. Congress can impose a tax on those that do not purchase insurance, or provide tax benefits to those that do purchase insurance. If Congress would like the states to implement an insurance mandate, it can avoid conflicts with the anti-commandeering principle by either preempting state insurance laws or by conditioning federal funds on state compliance. A federal employer mandate for state and local government workers may be subject to a challenge; however, such a challenge is unlikely to be successful. Individual rights challenges under the First Amendment's Free Exercise Clause or RFRA are unlikely to succeed, although a federal insurance mandate should include a statement that RFRA does not apply or provide for a religious exemption. Fifth Amendment Due Process and Takings Clause challenges are also unlikely to be successful. The legal analysis presented is likely to endure, as the Supreme Court's current position and approach to interpreting relevant constitutional issues appear to be stable.

Mr. BAUCUS. I might also say, Mr. President, the Senator from Oklahoma said the independent Medicare advisory board would ration care. In fact, he even accused us in the Congress—myself included—of voting against a prohibition on rationing. But, I might say, I am not for rationing care in the sense

that the Senator from Oklahoma talked about. I do not think anybody in this Congress is. We have to find a system that starts to control costs in a fair way, that increases quality but also cuts costs. That is the underlying premise of the delivery system reforms in this bill. But do not just take my word for it. Right here in the bill, on page 1004, the bill says, with regard to the advisory board:

The proposal shall not include any recommendation to ration health care.

I chuckle a little bit when I say that because the Senator from Oklahoma is very concerned about using the word "shall." If he does not like "shall," then I suppose he means the board would have discretion. But we say "shall not include any recommendation to ration health care." That is on page 1004 of the bill. It is right there in black and white letters. Read the bill. The prohibition against rationing of health care is right there.

Mr. President, I see the Senator from Ohio, who wishes to speak.

The PRESIDING OFFICER. The Senator from Ohio.

Mr. BROWN. Mr. President, I thank the Finance chairman for his leadership.

I have sat here listening. I was watching the debate in the last hour from my office, and then I came over in the last 20 minutes or half hour and watched from here. I am incredulous when I hear my colleagues on the other side of the aisle talk about "saving Medicare." This is the same group of people, with only one exception on the whole Republican side of the aisle, in 2003, who rammed through the Medicare privatization bill that was written by the drug companies and the insurance companies for the drug companies and the insurance companies.

Two things: One, they never paid for it. There was no discussion, no interest, no move to pay for their bill at all. Then they criticize that our bill is costing too much and running up the debt, when the Congressional Budget Office—which everyone knows is fair—they complain about the Congressional Budget Office. It is like at a sporting event. The losing team complains about the ref.

The other side, because they are losing, complains about the Congressional Budget Office. We know it plays fair. We cite it. We must. We do. It helps us move forward and helps us figure things out. But they did not even try to pay for their Medicare privatization bill because the drug companies and the insurance companies would not have gotten their way so much if they tried to pay for it. But the second thing is, their bill shortened the life expectancy of Medicare.

Our bill increases the life expectancy of Medicare for 10 years. And they have the gall to come to the floor and say our bill does not treat Medicare right, that our bill is going to ruin Medicare, that our bill whatever.

If you are a senior citizen in our country, understand what this bill does